

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

4 HOWARD VINCENT BROWN,)
5 Petitioner,) 2:13-cv-00253-GMN-NJK
6 vs.) **ORDER**
7 BRIAN WILLIAMS, *et al.*,)
8 Respondents.)

10 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
11 by a Nevada state prisoner.

12 The petition in the instant action challenges petitioner's state conviction in case number
13 01C178401 in the Eighth Judicial District for the State of Nevada. Petitioner previously challenged
14 this same state conviction with a § 2254 federal habeas petition in this Court, filed under case
15 number 2:04-cv-01539-KJD-PAL. The petition in case number 2:04-cv-01539-KJD-PAL was
16 reviewed on the merits and denied by order filed March 25, 2008. (ECF No. 57). Judgment was
17 entered the same date. (ECF No. 58). Petitioner appealed. (ECF No. 59). By order filed March 9,
18 2009, the United States Court of Appeals for the Ninth Circuit denied petitioner a certificate of
19 appealability and denied all motions on appeal. (ECF No. 80).

20 “Before a second or successive application permitted by this section is filed in the district
21 court, the applicant shall move in the appropriate court of appeals for an order authorizing the district
22 court to consider the application.” 28 U.S.C. § 2244(3)(A). The instant petition is a successive
23 petition, which requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to
24 pursue. *See* 28 U.S.C. § 2244(b)(3) *et seq.* In the prior habeas case in which petitioner challenged
25 his conviction (case number 2:04-cv-01539-KJD-PAL), the Court reviewed the merits of the petition
26 and denied the petition by order filed March 25, 2008. (ECF No. 57). Because the prior habeas

1 corpus petition was decided on the merits, the instant habeas petition is a successive petition.
 2 *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009).

3 On May 7, 2013, this Court entered an order requiring petitioner to show cause why this
 4 action should not be dismissed as a successive petition. (ECF No. 6). Petitioner filed an affidavit in
 5 response to the Court's order (ECF No. 7), but petitioner has not demonstrated that he has obtained
 6 leave to file a successive petition from the Ninth Circuit Court of Appeals. Therefore, the instant
 7 petition will be dismissed as successive.

8 In order to proceed with any appeal, petitioner must receive a certificate of appealability.
 9 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-
 10 951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). District
 11 courts are required to rule on the certificate of appealability in the order disposing of a proceeding
 12 adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for
 13 certificate of appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
 14 Cases. Generally, a petitioner must make “a substantial showing of the denial of a constitutional
 15 right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.
 16 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district
 17 court's assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at
 18 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
 19 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that
 20 the questions are adequate to deserve encouragement to proceed further. *Id.* In this case, no
 21 reasonable jurist would find this Court's dismissal of the petition debatable or wrong. The Court
 22 therefore denies petitioner a certificate of appealability.

23 **IT IS THEREFORE ORDERED** that this action is **DISMISSED** as a successive petition.

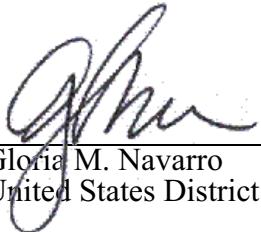
24 **IT IS FURTHER ORDERED** that all pending motions, including petitioner's motion for
 25 the appointment of counsel (ECF No. 2), are **DENIED**.

26 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**

1 APPEALABILITY.

2 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly.

3 Dated this 21st day of August, 2013.

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6 Gloria M. Navarro
7 United States District Judge

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